# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Regulations involved | 2 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 10 |
| Appendix | 11 |


## CITATIONS


| | |
|---|---|
| **Cases:** | |
| *Beard* v. *Stahr*, 370 U.S. 41 | 7 |
| *Greene* v. *McElroy*, 360 U.S. 474 | 3, 4, 6 |
| *Taylor* v. *McElroy*, 360 U.S. 709 | 7 |
| *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 | 9 |
| **Regulations:** | |
| Department of Defense Directive 5220.6, issued February 2, 1955, 20 Fed. Reg. 1553 | 4, 11 |
| Department of Defense Directive 5220.6, issued July 28, 1960, 32 C.F.R. 155, *et seq.*, 25 Fed. Reg. 7523 | 4, 11 |
| **Miscellaneous:** | |
| Executive Order 10865, 25 Fed. Reg. 1583, dated February 20, 1960 | 4 |

# In the Supreme Court of the United States

OCTOBER TERM, 1962

---

No. 887

WILLIAM L. GREENE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The order of the Court of Claims (Pet. App. A) was entered without opinion.

### JURISDICTION

On December 20, 1962, the Court of Claims denied petitioner's request for review of the Commissioner's order of December 5, 1962. The petition for a writ of certiorari was filed on March 1, 1963. The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether the Court of Claims erred in suspending proceedings in a suit for a money judgment arising out of an adverse determination relating to security clearance, pending pursuit by petitioner of his administrative remedies before the Department of Defense.

## REGULATIONS INVOLVED

The pertinent parts of regulations of the Department of Defense are set forth in the Appendix, *infra*, pp 11-16.

## STATEMENT

The facts comprising the background of this litigation are fully set forth in this Court's opinion in *Greene* v. *McElroy*, 360 U.S. 474, 476-491.

In 1951 petitioner was vice-president and general manager of Engineering and Research Corporation (ERCO). On December 11, 1951, he was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that his access to classified information was being preliminarily revoked pending a hearing before the Industrial Employment Review Board (IERB). Petitioner appeared at the hearing on January 23, 1952, and on January 29, 1952 the IERB reversed the action of the PSB and informed petitioner and his employer that he was authorized to work on secret contract work.

On April 17, 1953, the Secretary of the Navy notified petitioner that he had concluded that petitioner's continued access to classified Navy informa-

tion was inconsistent with the best interest of national security, and requested ERCO to bar petitioner from all classified projects and information.[1] Petitioner was thereafter discharged by ERCO. Following petitioner's request for reconsideration, the Navy informed him that it had requested the Eastern Industrial Personnel Security Board (EIPSB) to accept jurisdiction and to make a final determination concerning petitioner's status. On April 28, 1954, a hearing was held, and the EIPSB reached the same conclusion as had the Secretary. On September 15, 1955, petitioner requested review by the Industrial Personnel Security Review Board, and on March 12, 1956, he received a letter from the Director of the Office of Industrial Personnel Security Review affirming the determination of the EIPSB.

Petitioner then brought an action in the United States District Court for the District of Columbia seeking a declaration that the revocation of his clearance was unlawful and appropriate injunctive relief. On June 29, 1959, this Court held that, "in the absence of explicit authorization from either the President or Congress", petitioner could not be finally deprived of his security clearance "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474, 508. On remand, the district court entered a consent order which (1) declared the final revocation of petitioner's security clearance to

[1] At the time the Secretary acted, the PSB and IERB had been abolished. See *Greene* v. *McElroy*, 360 U.S. 474, 480-483.

be unauthorized; and (2) directed the expunging of all rulings, orders or determinations wherein or whereby the clearance was revoked (R. 4).

Thereafter, on December 28, 1959, petitioner made a demand on the General Counsel of the Department of the Navy for monetary restitution under paragraph 26 of the former (1955) Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553. *Infra*, p. 11 (R. 4). The General Counsel acknowledged receipt of this demand on January 11, 1960, (R. 4), and on April 20, 1960, petitioner supplied the General Counsel with additional information and claimed a loss of earnings of $49,960.41, from the date of dismissal to December 31, 1959 (R, 4-5).

Petitioner was then advised that the General Counsel had forwarded his claim to the Director of the Office of Security Policy of the Department of Defense for final determination. On January 4, 1961, petitioner renewed his claim in a letter to the Director (R. 5). On February 8, 1961, the Director wrote petitioner that he might submit additional material in writing, and that the Department of Defense was prepared to consider his case under the present Industrial Personnel Access Authorization Review Regulation, DOD Directive 5220.6, dated July 28, 1960. *Infra*, p. 11 (R. 5). This regulation was promulgated after this Court's decision in *Greene* v. *McElroy* pursuant to the express authority conferred upon the Secretary of Defense by the President in Executive Order 10865, 25 Fed. Reg. 1583, February 20, 1960.

On March 2, 1961 petitioner wrote to the Director, claiming restitution under paragraph 26 of the 1955 regulation, and declining to proceed under the 1960 regulation (R. 5-6). On March 16, 1961, the Director again expressed the willingness of the Department of defense to process petitioner's case under the 1960 regulation (R. 6).

On April 4, 1961, petitioner inquired of the Director whether the latter had authority to reconsider the case under the 1960 regulation without a request by petitioner (R. 6). The Director replied on May 15, 1961, reiterating that the Department was prepared to process the case at petitioner's request (R. 6). On June 1, 1961, the Deputy General Counsel of the Department of the Navy advised petitioner that he did not qualify for restitution under paragraph 26 of the former (1955) regulation, and again noted the offer of the Department of Defense to take prompt action on any request by petitioner to process his case under the 1960 regulation (R. 6-7).

Petitioner commenced this action in the Court of Claims on May 7, 1962, claiming money damages based on the Fifth Amendment and Paragraph 26 of the 1955 regulation (R. 1). The government filed a motion to suspend proceedings on July 5, 1962 (R. 9), which motion was denied on September 5, 1962 (R. 14). On December 5, 1962, before the extended time for filing an answer had elapsed, the Commissioner of the Court of Claims entered an order suspending proceedings pending petitioner's pursuit of his administrative remedies in the Department of Defense (R. 30).

Petitioner then requested review by the Court of Claims of the Commissioner's Order (R. 31). On December 20, 1962, the Court of Claims denied petitioner's request for review (R. 31).

## ARGUMENT

1. The order which petitioner seeks to have reviewed by this Court directed only that proceedings be suspended while petitioner pursued his administrative remedies to completion in the Department of Defense. No final order has been entered on any issue, and the Court of Claims has yet to adjudicate petitioner's entitlement to the monetary relief which he seeks. There are no compelling reasons why this Court should take the case from the Court of Claims at an interlocutory stage. No legal rights will be prejudiced by allowing the case to proceed to judgment in ordinary course following petitioner's exhaustion of the administrative process.

The petition erroneously asserts that the order of the Court of Claims is inconsistent with this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474. The suggestion is that this decision established petitioner's right both to access authorization for classified information and to money damages for the period during which his security clearance had been under a final revocation. But this Court was not called upon to consider, and did not in fact pass upon, petitioner's qualifications for access authorization or his right, if any, to monetary restitution. All that the Court decided was that there was a procedural

infirmity in the hearing which preceded the final revocation of the security clearance.

Under the regulation currently in effect, as well as that which was in force between 1955 and 1960, petitioner may obtain monetary restitution without resort to judicial proceedings if it is administratively determined that he is entitled to access authorization. See pp. 11, 15, *infra*. Under the present regulation, which was expressly authorized by the President (see p. 4, *supra*), the determination is made following a proceeding at which, with limited exceptions, the applicant has the right to confront and cross-examine adverse witnesses, on controverted issues.

As previously noted, petitioner has thus far declined to pursue this remedy. Since the outcome of the administrative proceedings might prove favorable to him, the court below was clearly correct in declining to entertain his claim at this juncture. Indeed, the court would have been justified in dismissing the action for failure to exhaust administrative remedies, instead of retaining jurisdiction pending petitioner's pursuit of those remedies. Cf. *Beard* v. *Stahr*, 370 U.S. 41.[2]

---

[2] *Taylor* v. *McElroy*, 360 U.S. 709, does not support petitioner here. Taylor had received a favorable determination of access authorization from the Department of Defense prior to oral argument before this Court. Hence the question on which certiorari was granted—the propriety of the procedures used in a prior revocation of access authorization—was no longer in issue, and this Court directed the dismissal of the action on the ground of mootness. The instant petitioner can hardly find comfort in *Taylor* when he refuses to seek relief under the regulations available to him.

Petitioner seeks to avoid the force of the holding that he should secure an administrative determination by pointing out that he has new employment and no longer wishes access to classified information. However, the administrative regulations have a dual purpose. One is the determination of access authorization; the other, restitution to persons who were improperly denied authorization. Petitioner has been advised that the Department of Defense will consider whether he would be entitled to an access authorization in order to determine whether he comes within the restitution provisions of the regulation. He can hardly suggest that the regulation should be more rigidly or restrictively interpreted.

2. Petitioner urges that he has a cause of action independent of the scheme for administrative restitution, *i.e.*, a Fifth Amendment right to just compensation for the taking of property. Assuming for the moment (but without conceding) that such a claim of right might be a tenable one, it hardly follows that the Court of Claims had no discretion to hold the complaint before it in abeyance in order to ascertain whether compensation under the administrative regulation will be forthcoming. Certainly, the grant of compensation under the regulation would moot the constitutional claim.

The reasons for abstention pending the conclusion of the administrative process are all the more compelling when one considers the novelty and difficulty of petitioner's theory. Certainly, in conventional legal terms there has been no taking of property by the United States. The government, in the interest

of national security, adopted regulations restricting the class of persons to whom its defense secrets would be made known. Persons denied access to classified government information may, to be sure, suffer consequential injury as a result of the program; their employers may decide to replace them. But consequential damage resulting from the administration of government regulations has not hitherto been thought to constitute a taking of property under the Fifth Amendment. Cf. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (War Production Board's prohibition of gold mining not a taking). On the face of it, it would appear that the government, in the instant case, has appropriated nothing to itself. This is not to deny that the government had an obligation to correct the defect which this Court found in its prior administrative proceeding. That, of course, is precisely what it is prepared to do under the administrative regulation.

The novel issues which petitioner seeks to raise are not ripe for decision. They may never be presented by this litigation. We touch upon them only to emphasize that it was entirely appropriate for the Court of Claims to pretermit them.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
*Solicitor General.*

JOHN W. DOUGLAS,
*Acting Assistant Attorney General.*

ALAN S. ROSENTHAL,
DAVID C. KATZ,
*Attorneys.*

APRIL 1963.

## APPENDIX

1. Department of Defense Directive 5220.6, issued February 2, 1955, 20 Fed. Reg. 1553, provides, in pertinent part, as follows:

> § 67.5-4 *Monetary restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

2. Department of Defense Directive 5220.6, issued July 28, 1960, 25 Fed. Reg. 7523, 32 C.F.R. 155, *et seq.*, provides in pertinent part, as follows:

> § 67.4-5 Procedures for personal appearance proceedings.
>
> (b) *Introduction of information.*
>
> * * * *
>
> (2) Unless permitted by subparagraphs (5) and (6) of this paragraph, the record may contain no information adverse to the applicant on any controverted issue unless (i) the information or its substance has been made available to the applicant and he offers no objection

to its presentation; or (ii) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this subparagraph (2), or by any other provision of this Part 67, may be received and made part of the record and may be considered by any board or official charged with making determinations under this Part 67.

* * * *

(5) Records compiled in the regular course of business, or other physical evidence other than investigative reports as such, relating to a controverted issue, which, because they are classified, may not be inspected by the applicant, may be received and considered provided that (i) the Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that purpose pursuant to section 5b, Executive Order 10865, has made a preliminary determination that said physical evidence appears to be material, and that failure to receive and consider it would, in view of the level of access sought, be substantially harmful to the national security, and (ii) to the extent that the national secur-

ity permits, a summary or description of said physical evidence shall be made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered.

(6) A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subdivisions (i) and (ii), provided however that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(i) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(ii) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to paragraph 4a(2) of Executive Order 10865, has preliminarily determined, after considering information furnished by the investi-

gative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

* * * *

§ 67.5-2 Reconsideration of prior decisions.

(a) Decisions rendered under any industrial personnel review program prior to the effective date of this Part 67 which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate

such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

* * * *

§ 67.5-3 Monetary restitution.

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. As used herein, earnings shall not include profits. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review pro-

gram. Payments under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 680654 1018